SUSPENSION OF DEPORTATION, SECTION 212(c) RELIEF, and CANCELLATION OF REMOVAL

I. OVERVIEW

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") merged deportation and exclusion proceedings into a single new process called removal proceedings. *Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003). IIRIRA also repealed suspension of deportation and section 212(c) relief, and established two analogous forms of relief under 8 U.S.C. § 1229b, entitled cancellation of removal. *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 n.2 (9th Cir. 2002). One form of cancellation is for applicants who are lawful permanent residents, (8 U.S.C. § 1229b(a)), and the other form is for those who not, (8 U.S.C. § 1229b(b)), *Romero-Torres v. Ashcroft*, 327 F.3d 887, 888 n.1 (9th Cir. 2003).

A. Continued Eligibility for Relief Under the Transitional Rules

Where the former INS commenced deportation proceedings before April 1, 1997, and the final agency order was entered on or after October 31, 1996, the IIRIRA transitional rules apply. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997). Under the transitional rules, an applicant "may apply for the pre-IIRIRA remedy of suspension of deportation if deportation proceedings against her were commenced before April 1, 1997." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597 (9th Cir. 2002) (citing IIRIRA § 309(c)); *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc).

Section 212(c) relief also remains available under the transitional rules, subject to the restrictions in section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118 n.1 (9th Cir. 2002). Additionally, certain individuals in removal proceedings remain eligible to apply for a section 212(c) waiver if they were eligible for relief at the time of their convictions. *INS v. St. Cyr*, 533 U.S. 289 (2001).

B. Commencement of Proceedings

Proceedings are commenced on the date the Order to Show Cause (pre-IIRIRA charging document) or Notice to Appear (IIRIRA charging document), is filed with the immigration court. *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597-98, 600 (9th Cir. 2002); *Cortez-Felipe v. INS*, 245 F.3d 1054 (9th Cir. 2001) (holding that proceedings commence on the date of filing, not on the date of service of the OSC).

Merely presenting oneself to the immigration service does not commence proceedings. *See Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105 (9th Cir. 2003) (holding that the filing of an asylum application before the IIRIRA effective date did not lead to a settled expectation of placement in deportation, rather than removal, proceedings); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 600 (9th Cir. 2002) (holding that removal proceedings do not commence upon the initial contact between the applicant and the INS).

II. JUDICIAL REVIEW

A. Limitations on Judicial Review of Discretionary Decisions

Under the IIRIRA permanent rules, applicable to removal proceedings initiated on or after April 1, 1997,

> no court shall have jurisdiction to review--
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i) , 1229b , 1229c , or 1255 of this title, or (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.'"

Montero-Martinez v. Ashcroft, 277 F.3d 1137, 1144-45 (9th Cir. 2002) (quoting 8 U.S.C. § 1252(a)(2)(B)).

Section 309(c)(4)(E) of the transitional rules contains a similar limitation on direct judicial review of discretionary decisions. For instance,

the transitional rules provide that "there shall be no appeal of any discretionary decision" under former section 244 of the INA. *Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997). Section 309(c)(4)(E) also eliminated judicial review over discretionary decisions involving section 212(c) relief. *See Palma-Rojas v. INS*, 244 F.3d 1191 (9th Cir. 2001) (per curiam).

B. Judicial Review Remains Over Non-Discretionary Determinations

This court has held that the above limitations on judicial review only preclude petition-for-review jurisdiction over decisions that involve the exercise of discretion. *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002). Accordingly, the court retains jurisdiction over non-discretionary questions, such as whether the applicant satisfied the continuous physical presence requirement, and whether an adult daughter qualifies as a child. *Id*. at 1144-45 (holding that court retained jurisdiction to review the purely legal question of whether the applicant's adult daughter qualified as a "child" for purposes of cancellation of removal); *see also Molina-Estrada v. INS*, 293 F.3d 1089 (9th Cir. 2002) (holding that the court retained jurisdiction to review whether the mother was a lawful permanent resident). The court of appeals also retains jurisdiction over certain moral character determinations. *See Kalaw v. INS*, 133 F.3d 1147, 1150, 1151 (9th Cir. 1997) (transitional rules); *Pondoc Hernaez v. INS*, 244 F.3d 752 (9th Cir. 2001) (retaining jurisdiction under transitional rules to review continuous physical presence); *see also Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. June 26, 2003) (holding that the court retained jurisdiction to consider whether the applicant was eligible for suspension under the petty offense exception).

The court of appeals also retains "jurisdiction to review whether the BIA applied the correct discretionary waiver standard in the first instance." *Murillo-Salmeron v. INS*, 327 F.3d 898 (9th Cir. 2003) (holding that section 309(c)(4)(E) did not divest the court of jurisdiction where the BIA purported to affirm a discretionary decision that the IJ did not make).

C. Jurisdictional Bar Limited to Statutory Eligibility Requirements

This court has "interpreted section 309(c)(4)(E) to pertain to the statutory eligibility requirements found in INA § 244(a)(1) and to the ultimate discretionary decision whether to grant the suspension based on the merits of the case." *Castillo-Perez v. INS*, 212 F.3d 518, 524 (9th Cir. 2000). An IJ's decision to deem an application for suspension to be abandoned, and the BIA's decision to dismiss a claim of ineffective assistance of counsel are not discretionary decisions under section 244 of the INA, and the court retains jurisdiction over these claims. *Id*. (remanding for application of the law as it existed at the time of applicant's original hearing).

D. Jurisdiction Over Constitutional Issues

The court retains petition for review jurisdiction to review constitutional claims, "even when those claims address a discretionary decision." *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001 (9th Cir. 2003) (retaining jurisdiction to consider whether the BIA's interpretation of the exceptional and extremely unusual hardship standard violates due process); *see also Reyes-Melendez v. INS*, No. 02-70526, 2003 WL 22053448 (9th Cir. Sept. 4, 2003) (retaining jurisdiction to review due process challenges to denial of suspension based on IJ bias); *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003) (retaining jurisdiction on petition for review of denial of cancellation, to review applicant's due process, ineffective assistance of counsel, and equitable tolling claims); *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105 (9th Cir. 2003) (holding that the application of the new rules did not violate petitioners' due process rights); *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc) (holding on petition for review from denial of suspension that the BIA's refusal to allow applicant to supplement the record with additional materials was a denial of due process); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) (holding that court retained jurisdiction to review claim that application of IIRIRA's permanent rules was impermissibly retroactive); *Larita-Martinez v. INS*, 220 F.3d 1092, 1095 (9th Cir. 2000) (retaining jurisdiction and rejecting due process claim that the BIA failed to review all relevant evidence submitted in a case).

Due process allegations must be "colorable," and "abuse of discretion claims recast as due process violations" do not qualify for direct review. *Sanchez-Cruz v. INS*, 255 F.3d 775 (9th Cir. 2001) (holding that allegations of IJ bias were colorable, but that applicant was required to exhaust her due process allegations before the BIA). "To be colorable . . . the alleged

violation need not be substantial, but the claim must have some possible validity." *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001) (internal quotations and citation omitted) (holding that applicant's allegation that the BIA misapplied case law was not a colorable due process claim).

E. Limitations on Judicial Review Based on Criminal Offenses

The IIRIRA permanent and transitional rules eliminate petition-for-review jurisdiction for individuals removable based on certain enumerated crimes. Section 1252(a)(2)(C) of Title 8 provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

Section 309(c)(4)(G) of the IIRIRA transitional rules provides:

[T]here shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

In order to preclude jurisdiction under this section, an applicant must be charged with and found removable based on an enumerated crime. *Alvarez-Santos v. INS*, 332 F.3d 1245 (9th Cir. 2003). Additionally, the court retains jurisdiction to address "three threshold issues: whether [the petitioner] is [1] an alien, [2] *removable,* and [3] removable because of a conviction for a qualifying crime." *Zavalleta-Gallegos v. INS*, 261 F.3d 951, 954 (9th Cir. 2001) (internal quotations omitted). Finally, where direct judicial review is unavailable, a habeas corpus petition may be brought in the district court

under 28 U.S.C. 2241. *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003).

For a more detailed discussion of the jurisdictional limitations on appeals by criminal aliens, *see* Criminal Issues in Immigration Law.

F. Jurisdiction Over Motions to Reopen

The denial of a motion to reopen is a final administrative decision subject to judicial review in the court of appeals. *See Sarmadi v. INS*, 121 F.3d 1319, 1321 (9th Cir. 1997); *Arrozal v. INS*, 159 F.3d 429, 435 n.3 (9th Cir. 1998). The transitional rules of IIRIRA did not eliminate jurisdiction to review the denial of a motion to reopen to apply for suspension, even though the underlying request for relief is discretionary. *See Arrozal*, 159 F.3d at 431-32; *see also Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223 (9th Cir. 2002).

However, where an applicant has been ordered deported on account of certain enumerated crimes, this court lacks petition-for-review jurisdiction over a motion to reopen. *See Sarmadi*, 121 F.3d at 1322 (dismissing petition for review from denial of motion to reopen to apply for suspension because petitioner was ordered deported based on two crimes of moral turpitude).

III. SUSPENSION OF DEPORTATION, 8 U.S.C. § 1254 (repealed) (INA § 244)

A. Eligibility Requirements

Under the pre-IIRIRA rules, an applicant "would be eligible for suspension if (1) the applicant had been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of the application for suspension of deportation; (2) the applicant was a person of good moral character; and (3) deportation would result in extreme hardship to the alien or to an immediate family member who was a United States citizen or a lawful permanent resident." *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc) (citing 8 U.S.C. § 1254(a)(1)).

A ten-year continuous physical presence requirement was required for applicants deportable for serious crimes who could show exceptional and extremely unusual hardship. *See Leon-Hernandez v. INS*, 926 F.2d 902, 905 (9th Cir. 1991) (citing 8 U.S.C. § 1254(a)(2)); *Pondoc Hernaez v. INS*, 244 F.3d 752, 755 (9th Cir. 2001).

1. Continuous Physical Presence

a. Jurisdiction

The court retains jurisdiction over the determination of whether an applicant has satisfied the seven-year continuous physical presence requirement. *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997).

b. Standard of Review

"We review for substantial evidence the BIA's decision that an applicant has failed to establish seven years of continuous physical presence in the United States." *Vera-Villegas v. INS*, 330 F.3d 1222, 1230 (9th Cir. 2003).

c. Proof

An applicant may establish the time element by credible direct testimony or written declarations. *Vera-Villegas v. INS*, 330 F.3d 1222 (9th Cir. 2003). Although contemporaneous documentation of presence "may be desirable," it is not required. *Id*.

d. Brief, Casual, and Innocent Departures

Brief, casual and innocent departures from the United States do not break a period of continuous physical presence. *Castrejon-Garcia v. INS*, 60 F.3d 1359 (9th Cir. 1995) (eight-day trip to Mexico seeking a visa was brief, casual and innocent); *Jubilado v. INS*, 819 F.2d 210, 213 (9th Cir. 1987); *Kamheangpatiyooth v. INS*, 597 F.2d 1253 (9th Cir. 1979); *cf. Hernandez-Luis v. INS*, 869 F.2d 496 (9th Cir. 1989) (holding that departure under grant of voluntary departure was not a brief, casual and innocent departure).

e. Pre-IIRIRA Rule on Physical Presence

Before IIRIRA, an applicant "continued to accrue time towards satisfying the seven-year residency requirement for suspension of deportation during the pendency of the proceedings." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002).

f. IIRIRA Stop-Time Rule

Under the IIRIRA "stop-time" rule, "any period of . . . continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear or an order to show cause why he or she should not be deported." *Arrozal v. INS*, 159 F.3d 429, 434 (9th Cir. 1998) (internal quotation omitted). "The stop-clock provision applies to all deportation and removal proceedings, whether they are governed by the transitional rules or the permanent rules." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002).

The stop-time rule applies to suspension of deportation cases heard on or after April 1, 1997. *See Ram v. INS*, 243 F.3d 510, 516-17 (9th Cir. 2001) (holding that the application of the new rule does not offend due process); *Astrero v. INS*, 104 F.3d 264, 266 (9th Cir. 1996) (holding that IIRIRA's stop-time rule could not be applied before its effective date of April 1, 1997); *Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1211 (9th Cir. 2001) (reversing premature application of the stop-time rule), *as corrected by* 250 F.3d 1271 (9th Cir. 2001); *Otarola v. INS*, 270 F.3d 1272, 1273 (9th Cir. 2001) (same).

g. NACARA Exception to the Stop-Time Rule

The Nicaraguan Adjustment and Central American Relief Act ("NACARA") exempts certain applicants from El Salvador, Guatemala, and certain specified Eastern Europeans from the stop-time provision. *See Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002); *Ram v. INS*, 243 F.3d 510, 517 and n.9 (9th Cir. 2001). For covered individuals, time accrued after issuance of a charging document may count towards the continuous physical presence requirement.

h. *Barahona-Gomez v. Ashcroft* Exception to the Stop-

Time Rule

The stop-time rule also does not apply to class members covered by the December 2002 settlement of *Barahona-Gomez v. Ashcroft*, No. C97-0895 CW (N.D. Cal). This class action challenged the Executive Office for Immigration Review's directive to halt the granting of suspension applications during the period between February 13, and April 1, 1997, based on the annual cap on suspension grants.

Eligible *Barahona-Gomez* class members may apply for renewed suspension of deportation under the law as it existed prior to the effective date of IIRIRA. For background on the case, *see Barahona-Gomez v. Ashcroft*, 167 F.3d 1228 (9th Cir. 1999), *supplemented by* 236 F.3d 1115 (9th Cir. 2001). The settlement agreement can be found at: www.usdoj.gov/eoir.

2. Good Moral Character

a. Jurisdiction

A finding of good moral character has both a statutory and a discretionary component. *See Campos-Granillo v. INS*, 12 F.3d 849, 853 (9th Cir. 1993). The court of appeals retains jurisdiction over the BIA's determination that an applicant could not show good moral character if that determination is based on one of the seven "per se" categories of individuals precluded from establishing good moral character set forth in 8 U.S.C. § 1101(f). *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997).

"[A]side from the applicability of any per se category, IIRIRA's transitional rules prohibit direct judicial review of the question of good moral character." *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997).

b. Standard of Review

"We review for substantial evidence a finding of statutory ineligibility for suspension of deportation based on a lack of good moral character." *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2000).

c. Time Period Required

The applicant must show that he or she has been of good moral character for the entire statutory period. *Limsico v. INS*, 951 F.2d 210, 213-14 (9th Cir. 1991) (declining to decide whether events occurring before the seven-year period may be considered). Moreover, the BIA must make the moral character determination based on the facts as they existed at the time of the BIA decision. *See Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc).

d. Statutory Per Se Ineligibility

(1) Aggravated Felonies

An applicant is statutorily ineligible for a finding of good moral character if he or she was convicted of an aggravated felony at any time. *See* 8 U.S.C. § 1101(f)(8); *Castiglia v. INS*, 108 F.3d 1101, 1103 (9th Cir. 1997). It is unclear whether this preclusion to a finding of good moral character applies to convictions for aggravated felonies (except for murder) before November 29, 1990. *Compare* Section 509 of the Immigration Act of 1990 (providing effective date of November 29, 1990) *with* IIRIRA § 321 (eliminating all previous effective dates).

(2) Confinement

A person confined, as a result of a conviction, to prison for an aggregate period of 180 days, cannot show good moral character. *See* 8 U.S.C. § 1101(f)(7); *Rashtabadi v. INS*, 23 F.3d 1562, 1571-72 (9th Cir. 1994).

(3) Alien Smuggling

"An alien is not considered to be of good moral character if during the five-year period he 'knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law' in violation of an alien smuggler provision." *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000) (holding that applicant who admitted that in 1995 he paid a smuggler to bring his wife and child into the United States

illegally was statutorily ineligible for a good moral character finding); 8 U.S.C. § 1101(f)(3).

(4) Drug-Related Crimes

Individuals convicted of controlled substance violations may not establish good moral character. *See Bazuaye v. INS*, 79 F.3d 118 (9th Cir. 1996); 8 U.S.C. § 1101(f)(3). The mandatory bar to good moral character does not apply to a single offense of simple possession of 30 grams or less of marijuana. 8 U.S.C. § 1101(f)(3).

(5) Crimes of Moral Turpitude

One crime of moral turpitude or multiple crimes, regardless of whether the crimes involve moral turpitude, preclude a finding of good moral character. *See* 8 U.S.C. § 1101(f)(3); *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000); *Hernandez-Robledo v. INS*, 777 F.2d 536 (9th Cir. 1985) (conviction of one crime involving moral turpitude).

(6) False Testimony

An applicant who has given false testimony to obtain an immigration benefit is ineligible for relief which requires a showing of good moral character. *See* 8 U.S.C. § 1101(f)(6); *Abedini v. INS*, 971 F.2d 188, 193 (9th Cir. 1992). "For a witness's false testimony to preclude a finding of good moral character, the testimony must have been made orally and under oath, and the witness must have had a subjective intent to deceive for the purpose of obtaining immigration benefits." *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2001); *Bernal v. INS*, 154 F.3d 1020 (9th Cir. 1998) (holding that applicant's false statements made under oath during naturalization examination precluding finding of good moral character).

(7) Other Grounds of Ineligibility

An applicant is also statutorily ineligible for a good moral character finding if he or she is a habitual drunkard, 8 U.S.C. § 1101(f)(1); a prostitute or polygamist, 8 U.S.C. § 1101(f)(3); or a professional gambler, 8 U.S.C. § 1101(f)(4) and (5).

3. Extreme Hardship Requirement

a. Jurisdiction

Determination of hardship "is clearly a discretionary act." *Kalaw v. INS*, 133 F.3d 1147, 1152 (9th Cir. 1997). The court is "no longer empowered to conduct an 'abuse of discretion' review of the agency's purely discretionary determinations as to whether 'extreme hardship' exists." *Torres-Aguilar v. INS*, 246 F.3d 1267, 1270 (9th Cir. 2001); *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc).

b. Qualifying Individual

Suspension applicants could meet the extreme hardship requirement by showing hardship to himself or to his or her United States or lawful permanent resident spouse, parent or child. *See* 8 U.S.C. § 1254(a)(1).

c. Pre-IIRIRA Cases Addressing Hardship

Under pre-IIRIRA case law, this court held that the BIA abuses its discretion when it fails to consider all relevant factors bearing on extreme hardship, or fails to articulate the reasons for denying relief. *See e.g. Watkins v. INS*, 63 F.3d 844 (9th Cir. 1995) (BIA must consider all factors and their cumulative effect). The relevant factors include separation from citizen children, economic hardship, community ties, medical needs, political conditions and other factors. *See e.g., Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998) (medical problems and political conditions); *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998) (family separation); *Ordonez v. INS*, 137 F.3d 1120 (9th Cir. 1998) (persecution); *Urbina-Osejo v. INS*, 124 F.3d 1314 (9th Cir. 1997) (community assistance and acculturation); *Tukhowinich v. INS*, 64 F.3d 460 (9th Cir. 1995) (considering hardship flowing from economic concerns); *Biggs v. INS*, 55 F.3d 1398 (9th Cir. 1995) (psychiatric information must be considered); *Cerrillo-Perez v. INS*, 809 F.2d 1419 (9th Cir. 1987) (family separation).

d. Current Evidence of Hardship

The BIA must decide eligibility for suspension "based, not on the facts

that existed as of the time of the hearing before the IJ, but on the facts as they existed when the BIA issued its decision." *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc) (holding that the BIA's refusal to allow applicant to supplement the record with additional materials was a denial of due process); *see also Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1212, *as corrected by*, 250 F.3d 1271 (9th Cir. 2001).

4. Ultimate Discretionary Determination

"Even if all three of these statutory criteria are met, the ultimate grant of suspension is wholly discretionary." *Kalaw v. INS*, 133 F.3d 1147, 1152 (9th Cir. 1997). "Thus, if the Attorney General decides that an alien's application for suspension of deportation should not be granted as a matter of discretion in addition to any other grounds asserted, the BIA's denial of the alien's application would be unreviewable under the transitional rules." *Id*.; *see also Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc).

B. Abused Spouses and Children Provision

Battered spouses, battered children, or the parent of a battered child, may apply for a special form of suspension. Suspension for abused spouses and children requires three years in the United States, good moral character, and extreme hardship. *See* former 8 U.S.C. § 1254(a)(3).

C. Persons Disqualified from Suspension

1. Failure to Appear or Depart

An individual is not eligible for suspension for a period of five years if he or she: (1) failed to appear at a deportation or asylum hearing after proper notice; (2) remained in the United States after the expiration of a grant of voluntary departure; or (3) failed to appear for deportation on a scheduled date. *See* 8 U.S.C. § 1252b(e) (repealed 1996).

2. Other Categories of Ineligibility

Persons who entered as crewmen after June 30, 1964, *see Guinto v. INS*, 774 F.2d 991 (9th Cir. 1985), and certain exchange visitors and students, *see* 8 U.S.C. § 1254(f)(2) and (3), are statutorily ineligible for suspension.

Those who assisted in Nazi persecution, *see Schellong v. INS*, 805 F.2d 655 (9th Cir. 1986), or engaged in genocide, are also not eligible for relief, *see* 8 U.S.C. § 1254(a) (excluding applicants described by former 8 U.S.C. § 1251(a)(4)(D)).

IV. SECTION 212(c) RELIEF, 8 U.S.C. § 1182(c) (repealed)

A. Overview

Former INA section 212(c) allowed certain long-time permanent residents to obtain a discretionary waiver for certain grounds of excludability and deportability.

Section 212(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provision of subsection (a) [classes of excludable aliens]." 8 U.S.C. § 1182(c).

Although the literal language of section 212(c) applies only to exclusion proceedings, the statute applies to deportation proceedings as well. *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1122 (9th Cir. 2002); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995).

Effective April 1, 1997, IIRIRA repealed section 212(c), and created a new and more limited remedy called "cancellation of removal for certain permanent residents." However, certain individuals remain eligible to apply for a section 212(c) waiver if they were eligible for relief at the time of their guilty plea convictions.

B. Eligibility Requirements

1. Seven Years

To be eligible for discretionary relief from deportation under former section 212(c), an applicant must have accrued seven years of lawful permanent residence status. *Ortega de Robles v. INS*, 58 F.3d 1355 (9th Cir. 1995) (holding that applicant could include time spent as a lawful temporary resident under the amnesty program). An applicant could continue to accrue legal residency time for the purpose of relief while pursuing an appeal of his deportation order. *See Foroughi v. INS*, 60 F.3d 570 (9th Cir. 1995); *see also Raya-Ledesma v. INS*, 55 F.3d 418 (9th Cir. 1994) (denying equal protection challenge to seven-year requirement); *Lepe-Guitron v. INS*, 16 F.3d 1021 (9th Cir. 1994) (holding that a parent's lawful unrelinquished domicile is imputed to his or her minor children).

2. Balance of Equities

The applicant must show that the balance of favorable and unfavorable factors weighs in favor of relief. *See Georgiu v. INS*, 90 F.3d 374 (9th Cir. 1996) (reversing BIA where it filed to address positive equities); *Liu v. Waters*, 55 F.3d 421 (9th Cir. 1995); *Alaelua v. INS*, 45 F.3d 1379 (9th Cir. 1995); *Kahn v. INS*, 36 F.3d 1412 (9th Cir. 1994); *Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994); *Rashtabadi v. INS*, 23 F.3d 1562 (9th Cir. 1994); *Yepes-Prado v. INS*, 10 F.3d 1363 (9th Cir. 1993).

Section 212(c) did not require a showing of good moral character or extreme hardship. *See* 8 U.S.C. § 1182(c).

C. Comparable Ground of Exclusion

Because INA former section 212(c) explicitly applied to the grounds of excludability, in order to be eligible for a waiver, an applicant in deportation proceedings had to show that that his ground of deportation had an analogous ground for exclusion. *See Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994) (holding that the waiver was not available for deportation based on a firearms offense because there is no comparable ground for exclusion).

D. Limits on Section 212(c) Relief

The Immigration Act of 1990 amended Section 212(c) to eliminate relief for aggravated felons who had served a term of imprisonment of at least five years. *Toia v. Fasano*, 334 F.3d 917, 919 (9th Cir. 2003). "Section 212(c) was further revised in 1991 to clarify that the bar applied to multiple aggravated felons whose aggregate terms of imprisonment exceeded five years." *Id*. at 919 n.1. Accordingly, before the passage of AEDPA and IIRIRA, an applicant convicted of an aggravated felony could qualify for section 212(c) relief, unless he had served a prison term of at least five years. *See id*.

Relief was also unavailable to persons based on national security, terrorist, or foreign policy grounds, or because the applicant participated in genocide or child abduction. *See* former 8 U.S.C. § 1182(c) (referring to sections 1182(a)(3) and (9)(C)).

E. Elimination of Section 212(c) Relief

1. AEDPA

Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") severely restricted section 212(c) relief to bar waivers for applicants convicted of most crimes, including those who had aggravated felonies (regardless of the length of their sentences), or those with convictions for controlled substances offenses, drug addiction or abuse, firearms offenses, two crimes of moral turpitude, or miscellaneous crimes relating to national security. *See Magana-Pizano v. INS*, 200 F.3d 603, 606 and n.2 (9th Cir. 1999); *United States v. Leon-Paz*, No. 02-10506, 2003 WL 21993292 (9th Cir. July 11, 2003).

2. IIRIRA

Section 304(b) of IIRIRA eliminated section 212(c) relief entirely, and replaced it with a new form of relief called cancellation of removal. *United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002).

However, the repeal of section 212(c) relief did not apply to proceedings falling under the IIRIRA transitional rules. *See Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118 n.1 (9th Cir. 2002). The transitional rules apply where the final agency order was entered on or after October 31, 1996, and the INS initiated deportation proceedings before April 1, 1997. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997). These pending transitional rule proceedings, however, are subject to the restrictions in section 440(d) of the AEDPA. *Id*.

Section 321 of IIRIRA also expanded the list of crimes defined as "aggravated felonies." *See e.g. United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002) (noting that "IIRIRA expanded the definition of 'aggravated felony' by [inter alia] reducing the prison sentence required to trigger 'aggravated felony' status for burglary from five years to one year."); *see also INS v. St. Cyr*, 533 U.S. 289, 296 n.4 (2001); 8 U.S.C. § 1101(a)(43) (definition of aggravated felony).

For a more detailed discussion on aggravated felonies, *see* Criminal Issues in Immigration Law.

F. Continued Eligibility for Relief

In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held that a retrospective application of the bar to 212(c) relief would have an impermissibly retroactive effect on certain lawful permanent residents. Accordingly, applicants who were convicted pursuant to plea agreements before AEDPA and IIRIRA, and who were eligible for section 212(c) relief at that time of their guilty pleas, remain eligible to apply for relief. *Id.* at 326.

G. Ninth Circuit Cases Addressing Elimination of Section 212(c) Relief

United States v. Leon-Paz, No. 02-10506, 2003 WL 21993292 (9th Cir. Jul. 11, 2003) (holding that defendant who pled guilty to burglary in October 1995 was entitled to be considered for section 212(c) relief because at the time of his plea, he did not have notice that section 212(c) relief would not be available in the event his conviction was reclassified as an aggravated felony); *cf. United States v. Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002)

(holding that the elimination of section 212(c) relief was not impermissibly retroactive where defendant's June 1996 guilty plea for burglary did not make him deportable under the law in effect at the time of the plea, and he had notice that AEDPA had already eliminated relief for aggravated felons).

Toia v. Fasano, 334 F.3d 917, 918 (9th Cir. 2003) (holding that the *St. Cyr* retroactivity analysis applied to aggravated felon who pled guilty before the Immigration Act of 1990, believing that he would be eligible for 212(c) relief at the time of his plea); *see also Angulo-Dominguez v. Ashcroft*, 290 F.3d 1147 (9th Cir. 2002) (remanding for application of the *St. Cyr* retroactivity analysis to conviction that pre-dated the Immigration Act of 1990).

Servin-Espinoza v. Ashcroft, 309 F.3d 1193 (9th Cir. 2002) (affirming a grant of habeas relief to a lawful permanent resident aggravated felon who was precluded from applying for section 212(c) relief during the time when the BIA allowed excludable aggravated felons to apply for such relief).

Armendariz-Montoya v. Sonchik, 291 F.3d 1116 (9th Cir. 2002) (holding that because the applicant elected a jury trial, the AEDPA restrictions on section 212(c) relief did not have an impermissibly retroactive effect; and finding no equal protection violation); *see also United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (finding no impermissible retroactive effect where applicant was convicted after a jury trial).

See also Magana-Pizano v. INS, 200 F.3d 603 (9th Cir. 1999) (holding that the bar to discretionary relief had an impermissible retroactive effect); *Alberto-Gonzalez v. INS*, 215 F.3d 906, 909-10 (9th Cir. 2000) (remanding denial of section 212(c) relief in light of *Magana-Pizano*); *see also Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001) (holding that that *Magana-Pizano* announced a new rule which could not be applied on collateral review in order to allow an applicant to seek a section 212(c) waiver).

V. CANCELLATION OF REMOVAL, 8 U.S.C. § 1229b

Individuals placed in removal proceedings on or after April 1, 1997 may apply for a new form of discretionary relief called cancellation of removal. One form of cancellation is for applicants who are lawful

permanent residents, (8 U.S.C. § 1229b(a)), and the other form is for those who not, (8 U.S.C. § 1229b(b)), *Romero-Torres v. Ashcroft*, 327 F.3d 887, 888 n.1 (9th Cir. 2003).

A. Cancellation for Lawful Permanent Residents, 8 U.S.C. § 1229b(a) (INA § 240A(a))

Cancellation of removal under 8 U.S.C. § 1229b(a) is similar to former section 212(c) relief, and provides a discretionary waiver of removal for certain lawful permanent residents.

1. Eligibility Requirements

In order for a lawful permanent resident to qualify for cancellation of removal under 8 U.S.C. § 1229b(a), an applicant must show: "(1) that she has been a legal permanent resident for five years; and (2) that she has resided continuously in the United States for a period of seven years after admission." *Cruz-Aguilera v. INS*, 245 F.3d 1070 (9th Cir. 2001) (order). Aggravated felons are ineligible for relief. 8 U.S.C. § 1229b(a)(3).

Cancellation is available for permanent residents who are either "inadmissible or deportable." *See* 8 U.S.C. § 1229b(a). The statute does not specifically require a showing of extreme hardship or family ties to a United States citizen or lawful permanent resident. *See id*.

2. Exercise of Discretion

The BIA has ruled that the factors relevant to determining whether a favorable exercise of discretion was warranted under former section 212(c) continue to be relevant in the cancellation context. *See Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998).

3. Termination of Continuous Residence

Under 8 U.S.C. § 1229b(d), the period of continuous residence ends upon the earlier of the following: (1) when the applicant is served with a notice to appear; or (2) when the applicant committed an offense referred to in section 1182(a)(2) (criminal grounds of inadmissibility) that renders him

inadmissible, or removable under sections 1227(a)(2) (criminal grounds of deportability), or 1227(a)(4) (security grounds of deportability). *See Cruz-Aguilera v. INS*, 245 F.3d 1070 (9th Cir. 2001) (order).

This court has not yet interpreted the provision terminating continuous residence and physical presence upon "commission" of an enumerated offense which renders an applicant inadmissible or removable. *See Matter of Perez*, 22 I. & N. Dec. 689 (BIA 1999) (holding that continuous residence ends at the time of the criminal misconduct).

a. Military Service

An applicant who has served at least three years of active duty in the armed forces need not fulfill the continuous residence requirement. *See* 8 U.S.C. § 1229b(d)(3).

B. Cancellation for Non-Permanent Residents, 8 U.S.C. § 1229b(b) (INA § 240A(b)(1))

1. Eligibility

Cancellation of Removal under 8 U.S.C. § 1229b(b) is similar to former suspension of deportation. To qualify for relief under the more stringent cancellation standards, a deportable or inadmissible applicant must establish that he or she:

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (B) has been a person of good moral character during such period; (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver); and (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229b(b)(1); *see also Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001 n.3 (9th Cir. 2003).

2. Ten Years of Continuous Physical Presence

Under 8 U.S.C. § 1229b(d)(1), the period of continuous physical presence ends upon the earlier of the following: (1) when the applicant is served with a notice to appear; or (2) when the applicant committed an offense referred to in section 1182(a)(2) (criminal grounds of inadmissibility) that renders him inadmissible, or removable under sections 1227(a)(2) (criminal grounds of deportability), or 1227(a)(4) (security grounds of deportability). *See Cruz-Aguilera v. INS*, 245 F.3d 1070 (9th Cir. 2001) (order).

This court has not yet interpreted the provision terminating continuous residence and physical presence upon "commission" of an enumerated offense which renders an applicant inadmissible or removable. *See Matter of Perez*, 22 I. & N. Dec. 689 (BIA 1999) (holding that continuous residence ends at the time of the criminal misconduct).

a. Departure from the United States

An applicant will fail to maintain continuous physical presence "if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." 8 U.S.C. § 1229b(d)(2).

Departure from the United States under a grant of voluntary departure breaks an applicant's continuous physical presence. *Vasquez-Lopez v. Ashcroft*, 315 F.3d 1201 (9th Cir. 2003) (per curiam), *as amended upon denial of rehearing en banc*, 343 F.3d 961 (9th Cir. 2003).

b. Military Service

An applicant who has served at least three years of active duty in the armed forces does not need to fulfill the continuous physical presence requirement. *See* 8 U.S.C. § 1229b(d)(3).

3. Good Moral Character

An applicant must establish that he or she has been a person of good moral character during the ten-year period preceding the application for cancellation. *See* 8 U.S.C. § 1229b(b)(1)(B). Automatic bars to a finding of good moral character are found in 8 U.S.C. § 1101(f); *see also* discussion of Good Moral Character under Suspension of Deportation, above.

4. Criminal Bars

An applicant is ineligible for nonpermanent resident cancellation if he or she has been convicted of an offense under 8 U.S.C. § 1182(a)(2) (criminal grounds of inadmissibility), 8 U.S.C. § 1227(a)(2) (criminal grounds of deportability), or 8 U.S.C. § 1227(a)(3) (failure to register, document fraud, and false claims to citizenship). *See* 8 U.S.C. § 1229b(b)(1)(C).

5. Exceptional and Extremely Unusual Hardship

a. Jurisdiction

The court lacks jurisdiction to review the heightened "exceptional and extremely unusual hardship" determination. *See Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003) (holding that the "'exceptional and extremely unusual hardship' determination is a subjective, discretionary judgment that has been carved out of our appellate jurisdiction").

The court has not yet decided whether jurisdiction remains to review disputed factual issues underlying the BIA's hardship determination. *See Romero-Torres,* 327 F.3d at 891 n.5.

b. Heightened Hardship Standard Does Not Violate Due Process

The BIA's interpretation of "exceptional and extremely unusual hardship" does not violate due process. *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001 (9th Cir. 2003).

c. Qualifying Relative

Under cancellation, hardship to the applicant himself will no longer support a grant of relief. *See Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc). The applicant must show the requisite degree of hardship to a "spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." *See* 8 U.S.C. § 1229b(b)(D).

An adult daughter twenty-one years of age or older does not qualify as a "child" for purposes of cancellation of removal. *Montero-Martinez v. Ashcroft,* 277 F.3d 1137, 1144-45 (9th Cir. 2002).

6. Exercise of Discretion

"Cancellation of removal, like suspension of deportation before it, is based on statutory predicates that must first be met; however, the ultimate decision whether to grant relief, regardless of eligibility, rests with the Attorney General." *See Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003).

C. Ineligibility for Cancellation

1. Aggravated Felons

A person convicted of any aggravated felony at any time is not eligible for cancellation. *United States v. Corona-Sanchez,* 291 F.3d 1201, 1210, n.8 (9th Cir. 2002) (en banc). The classes of crimes defined as aggravated felonies are found in 8 U.S.C. § 1101(a)(43); *see also* Criminal Issues in Immigration Law.

2. Security Grounds

Persons inadmissible or deportable under security and terrorism grounds are ineligible for cancellation. *See* 8 U.S.C. § 1229b(c)(4).

3. Previous Grants of Relief

A person previously granted cancellation, suspension, or section 212(c) relief is ineligible for cancellation. *See* 8 U.S.C. § 1229b(c)(6).

4. Failure to Appear or Depart

Cancellation is unavailable for ten years if an applicant was ordered removed for failure to appear at a removal hearing, unless he or she can show exceptional circumstances for failure to appear. *See* 8 U.S.C. § 1229a(b)(7). The ten-year bar also applies if an applicant failed to depart under a grant of voluntary departure. *See* 8 U.S.C. § 1229c(d).

5. Other Categories of Ineligibility

Crewmen who entered after June 30, 1964, certain exchange visitors, and individuals who have persecuted others are ineligible for relief. *See* 8 U.S.C. §§ 1229b(c)(1), (2), (3) and (5).

D. Numerical Cap on Grants of Cancellation and Adjustment of Status

IIRIRA limits the number of people who may receive cancellation of removal and adjustment of status to 4,000 per fiscal year. *See* 8 U.S.C. § 1229b(e).

E. NACARA Special-Rule Cancellation

The Nicaraguan Adjustment and Central American Relief Act ("NACARA") amended IIRIRA, and "allows certain individuals to apply for what is known as 'special rule cancellation,' which allows designated aliens to qualify for the more generous pre-IIRIRA suspension of deportation remedy, even though not charged by the INS until after IIRIRA's effective date (April 1, 1997)." *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1162 (9th Cir. 2002).

Special rule cancellation of removal is available for certain applicants from El Salvador, Guatemala, nationals of the former Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany,

Yugoslavia, or any state of the former Yugoslavia. *Ram v. INS*, 243 F.3d 510, 517 and n.9 (9th Cir. 2001).

1. NACARA Does Not Violate Equal Protection

This court has found that NACARA special rule cancellation does not violate equal protection. *See Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602-603 (9th Cir. 2002); *Ram v. INS*, 243 F.3d 510, 517 (9th Cir. 2001); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161 (9th Cir. 2002) (holding that limitation on eligibility for relief based on whether an applicant filed an asylum application by the April 1, 1990 deadline did not violate equal protection or due process).

2. No Tolling of NACARA Deadlines

NACARA's internal deadlines are statutory cutoff dates, and are not subject to equitable tolling. *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003).

The numerical cap on the number of adjustments arising from cancellation and suspension in 8 U.S.C. § 1229b(e) does not apply to NACARA special rule cancellation. *See* 8 U.S.C. 1229b(e)(3)(A).

3. Judicial review

The Ninth Circuit has not addressed the judicial review provision in section 309(c)(5)(C)(ii) of IIRIRA which provides that "[a] determination by the Attorney General as to whether an alien satisfies the requirements of clause (i) is final and shall not be subject to review by any court."

F. Battered Spouse and Child Provision

Battered spouses, battered children, or the parent of a battered child, may apply for a special form of cancellation of removal. Cancellation for abused spouses and children requires three years in the United States, good moral character, and extreme hardship. *See* 8 U.S.C. § 1229b(b)(2).